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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 737

ATLANTIC COASTLINE RAILROAD COMPANY,
Petitioner,

against

SIDNEY BLUMENTHAL & COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

CHAUNCEY I. CLARK,
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Counsel for Petitioner.

February 23, 1944.

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LAST POINT—It is respectfully submitted that the writ of certiorari prayed for should be granted, that the decision of the Circuit Court of Appeals be reversed, and that the judgment of the District Court be reinstated, with costs 24

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,
against
SIDNEY BLUMENTHAL & COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Atlantic Coast Line Railroad Company, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit rendered November 16, 1943 reversing a judgment of the District Court for the Southern District of New York rendered July 28, 1942 (R. 218-19). That judgment dismissed respondent's complaint on the merits. The complaint (R. 2-3) alleges the destruction of plaintiff's merchandise in transit. The defense alleged in the answer (R. 4-5) and sustained by the District Court was "Act of God".

Jurisdiction

Jurisdiction is based on Section 240 (a) of the Judicial Code as amended; 28 U. S. Code, 347.

The mandate of the Circuit Court of Appeals was entered December 17, 1943 and a petition for a rehearing was denied the same day (R. 236-40).

Opinions Below

The District Court made findings of fact and conclusions of law (R. 215-17) but filed no opinion.

The opinion of the Circuit Court of Appeals is reported at 139 F. (2d) 288.

The petition for rehearing (R. 231-5) was denied without opinion (R. 236).

Summary Statement

The action arises out of damage sustained by respondent's shipment of cotton goods while en route between Rocky Mount, North Carolina and Shelton, Connecticut. The box car containing respondent's goods was thrown overboard from a carfloat while in transit between Greenville, New Jersey, and Bay Ridge, Brooklyn, New York Harbor, during the hurricane of September 21, 1938. The carfloat and the towing tug, Transfer No. 20, were owned and operated by petitioner's connecting carrier, The New York, New Haven & Hartford Railroad Company.

The bill of lading contained the "Act of God" exception (opposite R. 214).

The case was tried to the Court without a jury upon a stipulation of facts (R. 212-14) and the testimony of witnesses, including the meteorologist of the New York Weather Bureau.

The District Court found that Transfer No. 20 had been engaged since 7:00 a.m. in towing carfloats back and forth between Greenville and Bay Ridge, during which time the weather was rainy and squally with a strong wind varying between northeast and north; that at 2:15 p.m. tug Transfer No. 20 pulled the float containing respondent's merchandise from the float bridges at Greenville and at 2:20 p.m. had turned its tow around and proceeded toward Bay Ridge; that when Transfer No. 20 left Greenville the weather was substantially the same as it had been since 7:00 a.m.; that when Transfer No. 20 had reached a point close to its Bay Ridge destination the wind suddenly shifted to the northwest and blew with hurricane velocity which caused the float to pitch and toss and throw overboard the car containing respondent's merchandise (R. 215-16).

The District Court further found that hurricane warnings were flown from the New York Weather Bureau from noon to 2:15 p.m., at which time the hurricane warnings were hauled down and northwest storm signals [forecasting less severe weather] were hoisted pursuant to instructions from Washington which contained the forecast that the hurricane would likely pass over Long Island and Connecticut late in the afternoon or early in the evening; that the voyage of Transfer No. 20 was reasonably expected to require not more than sixty minutes; that "the hurricane was not anticipated by the local office of the United States Weather Bureau"; that the damage to respondent's merchandise was caused by an Act of God, the

hurricane, without negligence on the part of petitioner or its connecting carriers (R. 216-17).

The Circuit Court of Appeals held that the question concerning petitioner's alleged negligence was one of law not of fact, that rule 52 of the Federal Rules of Civil Procedure was not binding and that it was free to consider the case *de novo*.

In spite of the District Court's finding that "the hurricane was not anticipated by the local office of the United States Weather Bureau" and in spite of the fact that when Transfer No. 20 set out, the hurricane warning signals were hauled down and the latest forecast was that the hurricane would not strike even Long Island and Connecticut until late in the afternoon or early in the evening, the Circuit Court of Appeals held that Transfer No. 20 "had reason to anticipate what she in fact encountered [the hurricane]" and held petitioner liable because of the negligence of its connecting carrier in setting out at 2:15 p.m.

The Circuit Court of Appeals expressly overruled its own prior decision in *O'Brien Bros. Inc.* v. *Davis, Director General*, 300 Fed. 84, C. C. A. 2, and held the connecting carrier negligent for failing to inform the tug master of what its shore employees could have learned concerning the Weather Bureau's storm warnings—but not the warnings current at 2:15 p.m., rather the hurricane warning then obsolete. It further overruled its decision in *O'Brien Bros. Inc.* v. *Davis, Director General, supra*, and held petitioner's connecting carrier negligent for failing to maintain a barometer.

The judgment of the District Court was reversed and a new trial ordered.

Questions Presented

1. In a case tried to the District Court without a jury does rule 52 of the Federal Rules of Civil Procedure, providing that "findings of fact shall not be set aside unless clearly erroneous * * *", apply to the Court's finding as to the existence or non-existence of negligence?

2. Is a carrier liable for loss directly caused by a hurricane, Act of God, where, when its tug sets out, neither the current Weather Bureau forecast nor local conditions indicate any likelihood of the hurricane?

3. Is a tug, ignorant of but chargeable with knowledge of the Weather Bureau forecast, to be charged with an obsolete or the current forecast?

4. Is a tug operator, in respect of a short harbor movement, to be judged as to negligence by knowledge its shore personnel might have obtained had they made inquiry at the Weather Bureau, or by Weather Bureau forecasts available to the tug master?

5. Is a carrier, as to a short harbor movement, bound to maintain and consult a barometer?

Reasons for Granting the Writ

1. The decision of the Circuit Court of Appeals as to its right to treat *de novo* the District Court's finding as to negligence is in conflict with the decisions of the Circuit Courts of Appeal for the Fifth, Eighth and Ninth Circuits

in the following cases: *Borserine* v. *Maryland Casualty Co.*, 112 F. (2d) 409, 416, C. C. A. 8; *United States* v. *DeBack*, 118 F. (2d) 208, C. C. A. 9; *City of San Diego* v. *Perry*, 124 F. (2d) 629, C. C. A. 9; *Fidelity & Deposit Co.* v. *Aberdeen Nat'l Bank & Trust Co.*, 124 F. (2d) 973, C. C. A. 8; *Stevens* v. *Edwards*, 112 F. (2d) 534, C. C. A. 5; *Andruss* v. *Nieto*, 112 F. (2d) 250, C. C. A. 9; *Helvering* v. *Johnson*, 104 F. (2d) 140 (C. C. A. 8; *United States* v. *Gamble-Skogmo Inc.*, 91 F. (2d) 372, 374, C. C. A. 8; *United States* v. *Washington Dehydrated Food Co.*, 89 F. (2d) 606, 609, C. C. A. 8.

In *Richmond & Danville Railroad Company* v. *Powers*, 149 U. S. 43, 45, this Court held that where there is uncertainty as to the existence of negligence the question is not one of law but of fact.

2. The decision of the Circuit Court of Appeals as to the effect of Weather Bureau storm warnings is in conflict with the decisions of the Circuit Courts of Appeal for the Third and Fourth Circuits and is so in conflict with various prior decisions in the Second Circuit as to leave the law wholly unsettled—see brief, *infra*, pages 11 to 20.

3. The decision of the Circuit Court of Appeals unsettling the law as to the operation of tugs as concerns the duty to observe or make inquiry concerning Weather Bureau forecasts, leaves the whole industry in doubt as to its rights and obligations.

Wherefore petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit commanding that Court to certify and

to send to this Court for its review and determination on a day certain to be named therein a full and complete transcript of the record and of the proceedings in the case numbered and entitled on its dockets "No. 66, October Term, 1943, Sidney Blumenthal & Company, Inc., Plaintiff-Appellant, against Atlantic Coast Line Railroad Company, Defendant-Appellee", and that the decision of the said Circuit Court of Appeals in said case be reversed and the judgment of the District Court therein be reinstated, and that your petitioner have such other and further relief as in the premises may be just.

ATLANTIC COAST LINE RAILROAD COMPANY
By CHAUNCEY I. CLARK
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Counsel

Certificate

We hereby certify that we have examined the foregoing petition, that in our opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

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New York, N. Y.,
February 23, 1944.